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IN THE

Supreme Court of the United States

October Term, 1964

No. 285

JACK BAER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on January 24, 1964.

CITATIONS TO OPINIONS BELOW

The per curiam opinion of the Court of Claims on Respondent's Motion to Dismiss the Petition (R. 101), is unreported and is printed in Appendix A hereto, *infra*, p.p. 13-16.

JURISDICTION

The judgment of the Court of Claims was entered on January 24, 1964 (R. 101), *infra*, p. 16. A timely petition for rehearing was filed with that Court (R. 105), and denied on April 17, 1964 (R. 117). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255(1).

QUESTIONS PRESENTED

1. Whether the statute of limitations has run on a claim against the United States for confiscation of a post-war debt owed Petitioner by a German National when the taking of Petitioner's property occurred only after the expiration of a reasonable time within which a final settlement of the post-war German external debt problem should have been concluded, so that the purportedly temporary actions of the United States postponing the right of American citizens to recover such debts became permanent in character, and Petitioner filed suit promptly thereafter.

2. Whether the United States is estopped to assert the defense of the statute of limitations against Petitioner's claim for the taking of his property when Petitioner's delay in commencing suit was occasioned by representations set forth in Official Acts of the United States that the Government's deprivation of his property was only temporary in character and that Petitioner's claim arising therefrom was subject to final settlement.

3. Whether the United States can avoid the Fifth Amendment's prohibition against taking private property for public use without just compensation and against depriving a citizen of his property without due process of law by limiting the time within which the injured citizen may assert his claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the Constitution of the United States. The statutory provisions involved are 28 U.S.C. §2501; United States Military Government Law No. 53; Articles XIII and XV of United States Military Government Law No.

63, and Allied High Commission Law No. 46, amending Article XV of United States Military Government Law No. 63. All of the foregoing provisions are printed in Appendix B, *infra*, pp. 17-23.

STATEMENT

Petitioner brought this action in the Court of Claims on January 29, 1963 against the United States to recover damages arising from the deprivation and ultimate confiscation of his property located in what is now the Federal Republic of Germany. (R. 1)

The property consisted of a 1946 debt of the value of $352,000 owed to Petitioner by a German national. The United States has prohibited repayment of all but six percent of this debt pending final settlement of German external debts arising during the period May 8, 1945 to June 21, 1948.

The jurisdiction of the Court of Claims was invoked pursuant to 28 U.S.C. §1491(1), (4), since Petitioner's claim was founded upon the Fifth Amendment to the United States Constitution and upon an implied contract with the United States.

Petitioner, Jack Baer, was a citizen of Germany. In 1937 he fled that country to escape Nazi persecution. Mr. Baer came to the United States, and in 1943 became an American citizen. (R. 51-52)

Prior to his departure for America he succeeded in liquidating most of his assets and delivered for safekeeping to his brother, Sigbert Baer, a package containing 880,000 Reichsmarks in 50 and 100 Reichsmarks denominations. (R. 52)

Sigbert Baer preserved the package intact and had the Reichsmark notes in his possession at the cessation of hostilities in Europe on May 8, 1945. Shortly thereafter Petitioner demanded return of his property from his

brother Sigbert. However, Sigbert Baer, who lived in Kuenzelsau, Wuertemberg, American Zone, was prohibited from transferring the money by United States Military Government Law No. 53, effective in the American Sector of Germany on May 28, 1945. (R. 52)

By virtue of United States Military Government regulations, Petitioner was prohibited from exercising any of the incidents of ownership over the 880,000 Reichsmarks, except the power, pursuant to license, to lend the money to his brother. (pp. 17-19, *infra*) Accordingly, in 1946, Petitioner lent the money to Sigbert for use in his business, and Sigbert duly registered acknowledgment of his obligation to repay the debt as required by the American Military Governor. The value of the debt in American currency was $352,000. Sigbert was financially able, at all times, to repay the debt. (R. 52-53)

The restrictions imposed by United States Military Government Law No. 53 remained in full force and effect until June, 1948, when certain Monetary Reform Laws were enacted by the United States Military Government. Under these laws Reichsmarks were replaced by Deutschemarks as the official currency.[1] While the value of one Reichsmark in American currency from May 8, 1945 until its retirement was forty ($.40) cents, the value of one Deutschemark from its introduction to the present date has never exceeded twenty-five ($.25) cents. (R. 53)

On June 26, 1948, United States Military Government Law No. 63 (Third Law for Monetary Reform) was promulgated. Article XV thereof permitted a United Nations creditor to receive payment from a German debtor of debts expressed in Reichsmarks at the rate of one Deutsche-

[1] These laws also provided for the settlement of German internal debts according to a sliding scale based on the nature of the obligation. German creditors were required to accept payment in Deutschemarks in full settlement of their claims, at ratios up to one Deutschemark for every 20 Reichsmarks owed. These provisions did not apply to United Nations creditors like Petitioner.

mark for every ten Reichsmarks owed. If the United Nations creditor objected to payment on these terms, he was denied the right to enforce his claim against the debtor until final settlement of the German external problem. (R. 53) (See pp. 20-21, *infra*).

Petitioner refused to accept conversion at this rate, and duly noted his objection as required by the law. (R. 54)

Subsequently, in 1951, Article XV of United States Military Government Law No. 63 was amended so as to perm Mr. Baer to accept payment of six percent of the debt owed to him by his brother, without waiving his claim to payment in full. (R. 54) (See p. 21, *infra*.) The determination of his German debtor's ultimate obligation was left to await the general settlement of the German external debt question and the central bank ("Land") of the debtor's residence was directed to indemnify the debtor against any additional liability which the final settlement might impose. (R. 54) (See p. 22, *infra*).

Accordingly, in 1951 Petitioner obtained 88,000 Deutschemarks valued at $20,944. (R. 54)

Final settlement of pre-war German external debts was concluded by the Agreement on German External Debts of February 27, 1953. (T.I.A.S. 2792) (R. 54) However, to the present date the United States has not concluded a "final settlement" of German post-war external debts, and Petitioner has not been permitted to collect the remainder of the debt due and owing to him from his German debtor, Sigbert Baer. (R. 55)

Petitioner filed his claim on January 29, 1963[2] to recover damages in the amount of $936,980.90, together with interest and costs, (R. 1), alleging that the United States, by the restrictions thus imposed, had used private property belonging to Petitioner to further its foreign policy objectives — the re-establishment of Germany's in-

[2] Subsequently, Petitioner was permitted to file a first amended petition to set forth certain additional, clarifying factual material. (R. 51, 101 n. 1)

ternational credit and the rehabilitation of the German economy. (R. 55) And, since the emergency requiring such use had terminated and a reasonable time within which to conclude a "final settlement" of post-war German external debts had expired, the continuing use of his property, Petitioner further averred, constituted a "taking" within the meaning of the Fifth Amendment. (R. 56)

The United States moved to dismiss the claim asserting (1) that there was no "taking" within the meaning of the Fifth Amendment, (2) that the "taking" was a non-compensable act of sovereignt , (3) that the actions complained of were those of the Allied Occupation Authorities, and (4) that the claim was barred by the six year statute of limitations.

The Court of Claims, considering only the defense of the statute of limitations, dismissed the petition (R. 101), which action it refused to reconsider. (R. 117)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims is in direct conflict with the opinion of this Court in *United States v. Dickinson*, 331 U.S. 745 (1947). Therein, the claimant's land was flooded and eroded as the result of the construction of a dam by the United States. The water level was raised in successive stages after the dam had become operational, and hence the extent of the landowner's damage was not at once determinable. This Court held that the statute of limitations did not commence to run until the full extent of the claimant's injury had been ascertained:

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical

rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck." 331 U.S. *supra* at 748-749.

Contrary to *Dickinson*, the court below decided that Petitioner's cause of action arose, and the statute of limitations began to run, long before the extent of his damage was ascertainable.

By operation of United States Military Government Laws 53 and 63, as amended in 1951, and associated regulations, Petitioner was and still is prevented from enforcing his claim against his German debtor to collect a loan made in 1946. However, neither Law 53, in force in 1946, nor Law 63, enacted in 1948, nor any of the subsequent amendments or associated regulations purported to do more than *temporarily* restrict the repayment of German external debts owing to American creditors and *temporarily* suspend Petitioner's right to proceed against his German debtor.

Each and every one of these ordinances expressly disclaimed any intent to make a final adjustment of German external debts or to determine permanently the amount of principal and interest on the debts which could be recovered by United States nationals. (See pp. 20, 21, *infra*).

Each and every one of these enactments specifically provided that the ultimate obligations of German debtors would be fixed at a "final settlement" of the German external debt problem, and that pending such final settlement the rights of American creditors to repayment in full would be preserved. (See pp. 21, 22, *infra*). By the very terms of these laws and regulations Petitioner's property was not "taken" but only temporarily used by the United States in support of its foreign policy objective of reconstructing the German economy. For such temporary deprivation, Petitioner is entitled not to the value of his property but only to the value of the use for the period of the deprivation—interest on the amount of the loan. *United States v. Peewee Coal Co., Inc.*, 341 U.S. 114 (1951).

Petitioner could not know how much, if any, of his capital would be taken by the United States until settlement of the German post-war external debt problem or until the passage of a reasonable time and the failure of the United States to arrange such settlement. The United States has not made a final agreement on German post-war external debts, although, as of January 29, 1963, the date of the filing of the instant suit, it has had a reasonable time within which to do so. Accordingly, Petitioner's claim for the confiscation of his property is based upon the failure of the United States, after the expiration of a reasonable time, to conclude a final settlement and to remove the presently subsisting temporary restrictions on the enforcement of his rights as a creditor. *Cf. Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924); *Woods v. Miller*, 333 U.S. 138 (1948); *Dillon v. Glass*, 256 U.S. 368 (1921); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Block v. Hirsh*, 256 U.S. 135 (1921).

However, six years have not elapsed between the ripening of Petitioner's cause of action and the commencement of this action.

Treaties, particularly those relating to the termination of hostilities, are traditionally the product of years of groundwork and negotiations.

It was not until *February 27, 1953*, that final settlement was made of pre-war German external debts owing to United States creditors (T.I.A.S. 2792, Art. 4(1)).

If it took so long for the adjustment of pre-war debts, surely Petitioner was justified in believing that a similar settlement of post-war debts would be forthcoming at a later date. And certainly he is not to be penalized by holding that a reasonable time for such settlement expired less than four years after the Treaty of 1953, before January 29, 1957, so as to commence the running of the statute against him. See *Pettibone v. Cook County*, 31 F. Supp. 881 (1940), *aff'd*, 120 F.2d 850 (8th Cir. 1941). (Uncertainty as to the existence of a cause of action because of delay in determining a matter of governmental concern upon which it depends always prevents the running of the statute of limitations.) Petitioner is thus not barred by the six year statute of limitations.

This court in *Dickinson* restrained the government from putting "on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy". 331 U.S. *supra* at 748. The court below did precisely what this Court said was impermissible and compelled Petitioner, at his peril, to guess when his cause of action for the taking of his property accrued. And, in playing the "guessing game", not even with the benefit of hindsight could the Court of Claims pinpoint the date when government failure to effectuate final settlement of German post-war external debts gave rise to Petitioner's claim for the taking of his property:

"The conversion to Deutschemarks occurred in 1948. If there was legal injury, *it became clear at that time or not long thereafter.*" (R. 103) (emphasis supplied).[1]

2. The Petition presents an important and frequently recurring question which has heretofore been decided inconsistently by this Court—whether the United States is subject to the doctrine of equitable estoppel. In *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947) the Court held the government not bound by the doctrine of estoppel while in *Moser v. United States*, 341 U.S. 41 (1951) the Court held the doctrine of estoppel applicable.

In cases involving private parties, the equitable doctrine of estoppel in pais applies to prevent an inequitable resort to a statute of limitations, and a defendant may by its representations, promises and conduct be estopped to assert the statute where the plaintiff, relying upon such behavior was lulled into a false sense of security to his prejudice. *Randon v. Toby*, 11 How. 493 (1850); *Schroeder v. Young*, 161 U.S. 334 (1896); *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253 (4th Cir. 1949), *cert. denied*, 339 U.S. 919.

One vestigial remnant of the discredited doctrine of "sovereign immunity" holds that in lawsuits to which the United States is a party, the Government cannot be estopped because in a bygone age it was thought that "the King of England could do no wrong." Even though it appears that the Founding Fathers did not altogether agree with this principle, it has gained some currency in this country.

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[1] Demonstrably, the court was wrong. All that occurred in 1948 was that Petitioner was permitted, if he wished, to accept repayment of his loan on the basis of one Deutschemark for each ten Reichsmarks of the principal sum. If he did not so elect, his right to full repayment at "final settlement" was expressly preserved. (pp. 20-21, *infra*) All that occurred in 1951 was that Petitioner was permitted to accept from his debtor one Deutschemark for every ten Reichsmarks of the principal obligation, without waiving his right to repayment in full, pending "final establishment of the amount thereof." (p. 22, *infra*)

The "no estoppel" dictum never had the support of reason. It no longer has the support of history. For, the doctrine has been given decent burial in the land in which it was spawned. *Robertson v. Minister of Pensions* [1949] 1 K. B. 227, 231-232.

It is submitted that this Court in this proceeding ought to exorcise the ghost which still haunts these shores. See *Davis, Administrative Law Treatise*, §17.01 et seq. (1958).

As Petitioner has already pointed out, the United States through Military Government Law No. 53 of 1945, Military Government Law No. 63 of 1948 and the amendatory Allied High Commission Law No. 46 of 1951 has consistently affirmed that Petitioner's claim for the balance of the debt owed him by his German debtor would be preserved pending the final settlement of the German post-war external debt problem. Relying upon these representations, Mr. Baer did not institute proceedings sooner than the present Petition. For only until a final settlement was reached could the extent of his injury, if any, be known. If, at such final settlement, his German debtor was required to pay one and three-fifths Deutschemarks for every Reichsmark owed, Petitioner's capital would be unimpaired and his property restored to him whole. His claim in that case would be only for the temporary deprivation of the use of the property by the United States for which damages in the nature of interest could be enforced. He therefore awaited the keeping by the United States of its solemn pledges. For him, such promises were more than "bare possibilities" as the Court of Claims suggested. (R-103)

To permit the United States to renege on its word and invoke the statute of limitations against Petitioner would be unconscionable. To permit the decision of the Court below to stand would be heinous, for it brands our Government with the stamp of "liar" and states with a clear voice for all the world to hear that in dealing with the United States one gives his trust at his peril.

3. This Court has previously not come to grips with the question whether Congress may evade the constitutional limitations placed upon the United States by enacting a statute of limitations. This is the case to meet that issue.

The Fifth Amendment's prohibition upon taking property without due process of law is an imperative upon the United States which brooks no qualifications or limitations. It cannot be avoided by that Government's placing of a limitation upon the time within which it may be called into account and the provisions of the Constitution enforced against it. Petitioner's claim for the taking of his property is founded upon the guarantees of the Fifth Amendment and cannot be barred by the Government whose actions are controlled by that provision.

In other contexts this Court has declared that rights guaranteed by the Fifth Amendment, as incorporated into the Fourteenth, cannot be thwarted by Government's limiting the time within which they must be asserted. *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963). This principle must be applied to the present cause.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALAN MILES RUBEN
Counsel for Petitioner

July 15, 1964

Appendix "A"

IN THE UNITED STATES COURT OF CLAIMS

No. 22-63

(Decided January 24, 1964)

JACK BAER *v.* THE UNITED STATES

Alan Miles Ruben for the plaintiff. *Melvin Rubin* of counsel.

Joan T. Berry, with whom was *Assistant Attorney General John W. Douglas*, for the defendant.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS THE PETITION

PER CURIAM: In his amended petition,[1] plaintiff, an American citizen naturalized in 1943, sets forth the following allegations:

a. Prior to March 23, 1937, he was a German citizen, leaving that country on that date for the United States on account of Nazi persecution. Before he left, he delivered for safekeeping to his brother (Sigbert Baer), in Germany, a package containing 880,000 Reichsmarks belonging to him; the brother agreed to return the money to plaintiff. Sigbert Baer kept the package until the cessation of hostili-

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[1] Plaintiff has moved to amend his original petition to allege certain additional facts. We grant this motion and treat in this opinion with the petition as amended.

ties in Europe in May 1945. Shortly thereafter, plaintiff demanded that his brother return the money, but Sigbert (who lived in the American Zone of Germany) was prohibited from repaying the sum by Military Government Law No. 53 (and associated regulations) which forbade the transfer of German funds outside of Germany. In 1946, plaintiff lent the money to Sigbert for use in his business; Sigbert, who was at all times able to repay, formally acknowledged his obligation of repayment. The value of the 880,000 Reichsmarks, plaintiff asserts, was $352,000.

b. In 1948, the occupation authorities replaced the Reichsmark with the Deutschemark as the internal German currency. Under this currency change, a United Nations creditor (like plaintiff) was allowed to receive payment from a German debtor of debts expressed in Reichsmarks at the rate of 1 Deutschemark for every 10 Reichsmarks owed; if the creditor objected to this conversion, he could not enforce his claim until final settlement of the German external debt problem. Plaintiff asserts that the Deutschemark has never been worth more than 25 cents, as compared to 40 cents for the Reichsmark. He refused to accept conversion at the rate of 10 to 1, but was permitted to accept 5.95% of the debt without waiving his claim to full payment. During the period from 1949 to 1952, he received 88,000 Deutschemarks (valued, he says, at $20,944); this money had to be spent in Germany and was not subject to exchange for dollars. It is also alleged that, although West Germany announced its intention in August 1952 to pay all the debts of its citizens to United Nations creditors, this promise could not be fulfilled because of the orders of the occupation government. Pre-war external debts of Germany have been dealt with by treaty, plaintiff avers, but not the post-war external German debt. He says that he has therefore not been permitted to collect the remainder of his debt.

c. Plaintiff's claim, on these allegations, is that the United States has taken his property, contrary to the Fifth

Amendment, without paying just or due compensation. The charge is that he has been improperly deprived of the remaining money in the hands of his brother—worth at least $331,056, he says—for foreign policy or other purposes of the United States. His total demand, apparently including interest from the date of alleged taking, amounts to more than $935,000.

The defendant has moved to dismiss on a number of grounds. We consider only the defense that the claim is barred by the six-year statute of limitations, 28 U.S.C. §2501.

The petition in this court was filed on January 29, 1963. Six years prior to that date was January 29, 1957. Plaintiff alleges no act or event relating to his claim which took place on or after January 29, 1957. All the circumstances and occurrences to which the amended petition refers were well before 1957. The alleged loan to plaintiff's brother occurred in 1946 and was acknowledged in that year and in 1948. Military Government Law No. 53, which prohibited the transfer of German funds beyond German borders, became effective in 1945. The Deutschemark replaced the Reichsmark in 1948, and the regulations on conversion were promulgated at that time. Plaintiff received 5.95% of the debt, in Germany, between 1949 and 1952. In 1952-1953, the occupying powers dealt with the problem of the pre-war German external debt. No event after 1953 is set up in the petition or amended petition. If a claim arose at all, it must have accrued sometime before 1957.

Plaintiff contends, however, that under the doctrine of *United States v. Dickinson*, 331 U.S. 745, 749 (1947), his cause of action did not ripen until the consequences of the Government's action had so manifested themselves that a final account could be struck, and that for him these consequences did not so manifest themselves until it became clear that the problem of the international settlement of the German post-war external debt was being postponed indefinitely. Cf. *Oro Fino Consolidated Mines, Inc. v. United*

States, 118 Ct. Cl. 18, 92 F. Supp. 1016, 1018 (1950), *cert. denied*, 341 U.S. 948 (1951). Plaintiff says that, if he had sued earlier, the defendant would have urged that his action was premature since a possible future settlement might allow him to collect the debt in full.

We cannot accept this argument. If plaintiff's legal rights were invaded by the events mentioned in his petition (as amended), that invasion had plainly been disclosed prior to January 1957. The conversion to Deutschemarks occurred in 1948. If there was legal injury, it became clear at that time or not long thereafter. The plaintiff asserts that, from that time, he could not obtain the bulk of his money. The alleged detriment was both known and definite long before 1957; the effects of the defendant's actions were all revealed and assessable. The bare possibility that some future international settlement—conceivably, decades in the future—*might* authorize plaintiff to collect his debt in full could not postpone the accrual of so specific a claim of present deprivation. This case is wholly unlike the *Dickinson* and comparable cases in which the course of future events could reasonably be expected to have a direct effect on the claimant's rights. Here the future circumstance on which the plaintiff relies was a mere indefinite possibility which was too slight to arrest the accrual of the claim (if one existed).

The claim is barred by limitations. The petition is dismissed on that ground.

Appendix "B"

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"... nor shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

* * * * *

28 U.S.C. §2501. Time for filing suit.

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues."

* * * * *

U. S. MILITARY GOVERNMENT LAW NO. 53, EFFECTIVE MAY 28, 1945.

Military Government — Germany

Supreme Commander's Area of Control

LAW No. 53

Foreign Exchange Control

ARTICLE I

Prohibited Transactions

1. Except as duly licensed by or on instructions of Military Government, any transaction involving or with respect to any of the following is prohibited:

(a) Any foreign exchange assets owned or controlled directly or indirectly, in whole or in part, by any person in Germany;

(b) Any property located in Germany owned or controlled directly or indirectly, in whole or in part, by any person outside Germany.

2. Any transaction with respect to or involving any of the following is prohibited, except as duly licensed by or on instructions of Military Government:

(a) Property wherever situated if the transaction is between or involves any person in Germany and any person outside Germany;

(b) Any obligation of payment or performance, whether matured or not, due or owing to any person outside Germany by any person in Germany;

(c) The importing or otherwise bringing into Germany of any foreign exchange assets, German currency, or securities issued by persons in Germany and expressed or payable in German currency;

(d) The exporting, remitting, or other removal of any property from Germany.

3. All existing licenses and exemptions issued by any German Authority authorizing any of the aforesaid transactions are cancelled.

ARTICLE II

Declaration of Property and Obligations

4. (a) Within thirty (30) days of the effective date of this law, unless otherwise ordered, any person owning or controlling directly or indirectly, in whole or in part, any foreign exchange asset, or owing any obligation of payment or performance, whether matured or not, to a person outside Germany, shall file with the nearest branch of the Reichsbank, or other institution designated by Military Government, a written declaration of such asset or obligation in such form and manner as will be prescribed by Military Government.

(b) When and as directed by Military Government, any person affected by this law shall file such other reports as may be required.

ARTICLE III

Delivery of Property

5. Within fifteen (15) days of the effective date of this law, all of the following classes of property shall be delivered, against receipt therefor, by the owner, holder or other person in possession, custody, or control thereof, to the nearest branch of the Reichsbank, or as otherwise directed:

(a) Currency other than German currency;

(b) Checks, drafts, bills of exchange and other instruments of payment drawn on or issued by persons outside Germany:

(c) Securities and other evidences of ownership or indebtedness issued by:

(I) Persons outside Germany; or

(II) Persons in Germany if expressed in a currency other than German currency;

(d) Gold or silver coin; gold, silver or platinum bullion or alloys thereof in bullion form.

6. Any person owning or controlling directly or indirectly, in whole or in part, any other type of foreign exchange asset, shall, when ordered by Military Government, deliver, against receipt, the possession, custody or control of such asset to the nearest branch of the Reichsbank, or as otherwise directed.

7. Any property referred to in this Article which hereafter comes into the possession, ownership or control of any

person subject to this law, shall, within 3 days thereof, be delivered by such person in the same manner as provided in this Article.

ARTICLE IV

Applications for Licenses

8. Applications for licenses to engage in transactions prohibited by this law, or any request in relation to the operation of this law, shall be submitted in accordance with such regulations as may be issued at a future date by Military Government.

ARTICLE V

Void Transactions

9. Any transfer effected in violation of this law and any agreement or arrangement made, whether before or after the effective date of this law, with intent to defeat or evade this law or the objects of Military Government, is null and void.

* * * * *

UNITED STATES MILITARY GOVERNMENT LAW NO. 63, EFFECTIVE JUNE 26, 1948.

Article 13, Sec. 3. "Reichsmark debts and claims for the purposes of this Law, are all debts and claims arising out of debts incurred before 21st June 1948, which are expressed in RM . . . or which would have had to be discharged in RM under the provisions in force prior to the effective date of the Currency Law . . ."

Article 15. Liabilities to United Nations Nationals

"1. The provisions of Part Two of this Law shall apply to Reichsmark liabilities to United Nations Nationals, unless the United Nations creditor refuses a payment tendered or made in accordance with the provisions of this Law, or objects by a declaration made to the debtor on or before

20th August, 1948, against the conversion of the debt into Deutsche Marks as provided by this Law.

"2. In the case specified in paragraph 1 above, the Land in which the debtor has his residence, seat or place of business shall guarantee the debtor against any liability arising under the original contract by reason of the refusal or objection of the creditor over and above that resulting from a conversion of the debt in accordance with the provisions of Article 16 . . ."

"3. . . .

"4. Any debt within the purview of paragraphs 2 and 3 shall cease to be enforceable by the United Nations creditor until settlement of the Reichsmark debt due to United Nations Nationals."

* * * * *

ALLIED HIGH COMMISSION LAW NO. 46, EFFECTIVE JAN. 25, 1951.

LAW NO. 46

AMENDMENT OF LEGISLATION
CONCERNING MONETARY REFORM

"The Council of the Allied High Commission enacts as follows:

ARTICLE 1

"Article XV (15) of British and United States Military Government Laws Nos. 63 is hereby amended to read as follows:

" 'Article XV (15)

Liabilities to United Nations Nationals

(1) Subject to Paragraph (2) of this Article, the provisions of Part Two of this Law shall apply to Reichs-

mark debts owing to United Nations nationals and debts owed by secondary debtors as defined in paragraph (8), provided that the debtors shall remain liable for any additional liability which the final settlement of Reichsmark debts owing to United Nations nationals may impose.

(2) a) Except as provided in paragraph (5) of this Article the provisions of Part Two of this Law shall not apply to the debts referred to in paragraph (1) whenever a creditor refuses a payment tendered or made in accordance with the provisions of this Law or has objected by a declaration made to the debtor or secondary debtor on or before 20th October 1948 against the conversion of a Reichsmark debt as provided by this Law. In such cases the debt shall not be enforceable by the creditor before the said final settlement.

b) . . .

(3) The Land in which the debtor or secondary debtor has his residence seat or place of business shall indemnify the debtor or secondary debtor against any liability arising from the said final settlement in excess of that resulting from a conversion in accordance with Part Two of this Law. Except as provided in paragraph (4), such additional liability and such indemnity shall not be deemed a liability or asset, respectively, of the debtor or secondary debtor for any purpose until final establishment of the amount thereof.

(4) . . .

(5) . . .

(6) Except with the consent of the creditor no payment in Deutsche Marks shall discharge a debtor or secondary debtor of any liability expressed in foreign currency.

(7) A debtor or secondary debtor who, by reason only of the fact that one or more of his creditors are United Nations nationals, is exempt from the provisions of any Equalisation of Burdens legislation enacted before 1 December, 1950, shall make to the Land (or any agency appointed by such Land) within which he has his residence, seat or place of business, the same payments as he would be required to make if such creditors were not United Nations nationals. The Land (or any agency appointed by it) shall administer such payments as Trustee on behalf of the United Nations creditor and the Equalisation of Burdens Fund until the terms of the final settlement of Reichsmark debts owing to United Nations nationals are known, and shall then dispose of such payments in accordance with the terms of such final settlement and other relevant legislation.'"

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 285

JACK BAER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 13–16) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 24, 1964. A timely motion for rehearing was denied on April 17, 1964. The petition for a writ of certiorari was filed on July 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly dismissed the action as barred by the statute of limitations (28 U.S.C. 2501).

744-406—64

STATUTE INVOLVED

Section 2501, Title 28, United States Code, provides in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT

Petitioner commenced this action in the Court of Claims on January 29, 1963, to recover for an alleged "taking" of his property without just compensation. The Court of Claims dismissed the action as barred by the six-year statute of limitations, 28 U.S.C. 2501, ruling that no event concerned with the alleged deprivation occurred after 1953.

The facts giving rise to petitioner's claim were as follows: Prior to 1937, petitioner was a German citizen. As a result of Nazi persecution, he left Germany during 1937, came to the United States and, in 1943, became an American citizen. Before leaving Germany, he left with his brother for safekeeping a package of 880,000 Reichsmarks. Shortly after cessation of hostilities in Europe in May, 1945, petitioner demanded return of the money. However, petitioner's brother (who lived in the American zone of occupied Germany) was unable to comply because Military Government Law No. 53, effective May 28, 1945 (Pet. 17), prohibited the transfer of German funds outside of Germany. In 1946, petitioner lent the money to his brother, who formally acknowledged the obligation.

Petitioner's brother has always been financially able to repay this debt. Petitioner alleged that the value of the 880,000 Reichsmarks was $352,000 (Pet. 4, 14, 17–20).

By Military Government Law No. 63, effective June 26, 1948 (Pet. 20–21), adopted for purposes of monetary reform, the Reichsmark was replaced by the Deutschemark; and a United Nations creditor, like petitioner, was permitted to receive payment from a German debtor of debts expressed in Reichsmarks at the rate of one Deutschemark for every ten Reichsmarks. A creditor, however, might refuse to accept payment on this conversion basis (Pet. 4–5, 14, 20–21). Petitioner did refuse. Subsequently, under Allied High Commission Law No. 46, effective January 25, 1951 (Pet. 21–23), amending legislation concerning monetary reform, petitioner received 88,000 Deutschemarks in 1951, without waiving his right to participate further in the "final settlement of Reichsmark debts owing to United Nations nations * * *" (Pet. 5, 22).

Petitioner alleges that there has never been a settlement of the German post-war external debt, and that he has been unable to collect the remainder of his debt (Pet. 5, 14). On this basis, he asserts that the United States has taken his property without just compensation. He claims more than $935,000, including interest from the date of the alleged taking (Pet. 5–6, 15).

The government challenged the substance of petitioner's claim and also urged the bar of the six-year statute of limitations (28 U.S.C. 2501). In dismiss-

ing, the Court of Claims considered only the question of limitations, concluding (Pet. 13–16):

> * * * If plaintiff's legal rights were invaded by the events mentioned in his petition (as amended), that invasion had plainly been disclosed prior to January 1957. The conversion to Deutschemarks occurred in 1948. If there was legal injury, it became clear at that time or not long thereafter. The plaintiff asserts that, from that time, he could not obtain the bulk of his money. The alleged detriment was both known and definite long before 1957; the effects of the defendant's actions were all revealed and assessable. The bare possibility that some future international settlement—conceivably, decades in the future—*might* authorize plaintiff to collect his debt in full could not postpone the accrual of so specific a claim of present deprivation. This case is wholly unlike [*United States* v. *Dickinson,* 331 U.S. 745] and comparable cases in which the course of future events could reasonably be expected to have a direct effect on the claimant's rights. Here the future circumstance on which the plaintiff relies was a mere indefinite possibility which was too slight to arrest the accrual of the claim (if one existed).

ARGUMENT

The decision below is correct. In addition, even had the statute of limitations not foreclosed petitioner's claim, he presented no substantial basis for recovery. Review by this Court is therefore not warranted.

1. Petitioner claims that his property, *i.e.*, part of the Reichsmark debt owed to him by his brother, was "taken" by the United States through the institution of currency reform in occupied Germany which replaced the Reichsmark with the Deutschemark at a conversion rate of ten to one. Pursuant to this currency conversion, petitioner has received 88,000 Deutschemarks for a prior debt of 880,000 Reichsmarks. There is no substance to the claim that such a currency conversion or reevaluation constituted a "taking" of petitioner's property. The contrary was established at an early date by the *Legal Tender Cases,* 12 Wall. 457, 551–552. The reasons for refusing to consider currency regulations as "takings" are especially strong when they accompany the occupation of foreign territory as a consequence of war. See *Eisner* v. *United States,* 127 Ct. Cls. 323; *Bank of the Philippine Islands* v. *Rogers,* 165 F. Supp. 100 (D. D.C.), affirmed, 281 F. 2d 12, certiorari denied, 364 U.S. 927; *Aboitiz & Co.* v. *Price,* 99 F. Supp. 602, 615 (D. Utah).

2. Even if the currency conversion of Reichsmarks into Deutschemarks was, *arguendo,* a taking, it occurred no later than 1951, twelve years before the present action was begun. Petitioner argues, however, that the currency reform was not intended to be a final settlement of the debt owed to him, because eventual "repayment in full" was contemplated. (Pet. 8.) He reasons that the pendency of final settlement delayed the date of the taking under the doctrine of *United States* v. *Dickinson,* 331 U.S. 745.

In addition to the reasons stated in the opinion of the Court of Claims as to why the *Dickinson* case is not applicable to the present situation, the following is dispositive against petitioner's contention. Effective May 5, 1955, the United States, along with the United Kingdom, France and the Federal Republic of Germany, signed a protocol terminating the occupation regime in the Federal Republic of Germany and generally returning the powers of government to the Federal Republic. 6 U.S.T. 4251; T.I.A.S. 3425. If, as petitioner contends, no taking had occurred by the date on which the United States relinquished authority over Germany, the United States obviously cannot be made responsible in damages for any taking which occurred thereafter through the subsequent action or inaction of another sovereign. On the other hand, if a taking occurred for which the United States may be held responsible, it must have occurred before May 1955, which was more than six years prior to the institution of the present action.

3. Nor is there merit in petitioner's final argument that Congress was without power to establish a statute of limitations on suits against the United States for a "taking" under the Fifth Amendment. That contention overlooks the fact that, when Congress consents to suit, it may attach such conditions as it deems desirable. One availing himself of the privilege of suing the government is bound by those conditions. *McElrath* v. *United States*, 102 U.S. 426, 440.

CONCLUSION

For the foregoing reasons, petition for writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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SEPTEMBER 1964.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 285

JACK BAER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY BRIEF

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IN THE

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No. 285

JACK BAER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. THE 1955 PROTOCOL BETWEEN THE UNITED STATES AND THE FEDERAL REPUBLIC OF GERMANY HAD NO BEARING WHATSOEVER UPON THE ACCRUAL OF PETITIONER'S CLAIM FOR THE CONFISCATION OF HIS PROPERTY BY THE UNITED STATES.

Did the purportedly temporary suspension by the United States of Petitioner's right to collect the debt owed him by a German national become a permanent taking more than six years prior to the institution of the present action? The Government insists that the Statute of Limitations has run but is uncertain as to the event or date which started the statute ticking.

The latest theory advanced by the Government is that the West German Protocol of May 5th, 1955 (6 U. S. T. 4251) insulates the United States from liability. But the Protocol nowhere intimates that the United States will not conclude a final settlement of post-war claims; much less does it suggest that the partial payments permitted on German external post-war debts would constitute payment in full. The Protocol expressly provides to the contrary. Therein the United States required that legislation enacted by the Occupation Authorities was to remain in force unless and until repealed by the German Federal and Land Authority. CONVENTION ON THE SETTLEMENT OF MATTERS ARISING OUT OF THE WAR AND THE OCCUPATION, Ch. 1, Art. 1, 6 U.S.T. 4412. No. federal legislation has repealed the provisions of Allied High Commission Law No. 46 of January 25, 1951, (which amended United States Military Government Law No. 63 of June 26, 1948), prohibiting repayment of German post-war external debts.

II. PETITIONER'S ACTION FOR THE CONFISCATION BY THE UNITED STATES OF A POST-WAR DEBT OWED TO HIM BY A GERMAN NATIONAL CLEARLY SETS FORTH A MERITORIOUS AND COMPENSABLE CLAIM UNDER THE FIFTH AMENDMENT.

Cut off from all beneficial use of his funds in Germany by United States Military Government Regulations, Petitioner lent his brother Sigbert 880,000 Reichsmarks in 1946. This debt constituted Petitioner's property in the American Zone of Occupation, *Standard Oil Company v. New Jersey*, 341 U. S. 428 (1951), with a value of $352,000 in United States currency. *Thorington v. Smith*, 75 U. S. 1, 13-14 (1868). Although an intangible chose-in-action, the property was no different in legal contemplation than a parcel

of land or an article of furniture, and entitled to precisely the same constitutional protection against confiscation. *Brown v. United States* 17 U. S. 110, 124 (1814).

The failure of the United States for seventeen years to make "final settlement" of German external post-war debts —those arising before June 21, 1948,—and meanwhile to continuously deprive Petitioner of the right to collect his claim has now resulted in the taking of his property.

The "fact" which has occurred within the past six years prior to the filing of the instant complaint is the expiration of a reasonable period of time without the termination of these so-called temporary restrictions. What was once called "temporary" has now ripened to that permanency which allows Petitioner to contend that his property has been "taken".

The United States has made it impossible for Petitioner to enforce his claim and thereby destroyed the value of the debt owing to him. Such destruction "took" the property value of the debt within the meaning of the Fifth Amendment. *Armstrong v. United States* 364 U. S. 40, 49 (1960); *United States v. General Motors* 323 U. S. 373, 378 (1945).

III. The Solicitor General Errs; Petitioner's Loss Was Occasioned by Confiscation of His Debt and Not by Currency Regulation.

The Solicitor General mistakenly assumes that Petitioner's claim arises as a result of a currency reform or revaluation.

But the so-called monetary reform laws of 1948 had no application to the Petitioner. They provided for the replacement of the Reichsmark as the unit of German cur-

rency by the Deutchemark [1] and for the settlement of German *internal* debts according to a sliding scale based upon the character of the obligations. The terms of the Monetary Reform Laws made it clear that they were in no way to affect debts owed by German nationals to United Nations creditors.

Only Article XV of the Third Monetary Reform Law, United States Military Government Law No. 63, promulgated June 21, 1948, concerned American creditors who wished to accept a conversion ratio of 10 to 1. The Petitioner refused to avail himself of this right until subsequent regulations were enacted permitting him to accept such payment without prejudice to his claim for the remainder of the debt due him.

Petitioner complains of confiscation of his debt by reason of the unreasonable delay in lifting the moratorium on debt repayment by German debtors to American creditors.

Petitioner concedes that the regulation of currency in occupied territory is a permissible exercise of sovereign power, but the confiscation of debt is no part of that power. For centuries it has been acknowledged by the United States and by every civilized nation that such annulment of private rights outrages fundamental principles of justice. *United States v. Percheman*, 32 U. S. 51, 86-87 (1833); *7 Hamilton's Works*, 329, Camillus No. XVIII (1794); *Ware v. Hylton*, 3 Dall. 199, 281 (1796); *Planters' Bank of Tenn.*

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[1] There was no devaluation. The Deutschemark simply replaced the Reichsmark as the currency of West Germany and the internal value of these two currencies were identical, one with the other. So much the United States, through the Department of State, has already acknowledged. 18 DEPARTMENT OF STATE BULLETIN 836 (JUNE 27, 1948).

The currency conversion was merely a device to thwart high ranking Nazi officials and black marketeers who had managed illicitly to amass and secrete large sums in Reichsmarks. They could not risk detection by presenting their hoards for conversion and so their holdings in Reichsmarks were rendered worthless.

v. Union Bank of La., 83 U. S. 483 (1872); *Williams v. Bruffy*, 96 U. S. 176 (1877); *Hanger v. Abbot*, 73 U. S. 532 (1867).

When in 1961 the Cuban Government suspended the right of American citizens to collect debts owing to them by Cuban nationals, the United States Department of State denounced the exchange controls as a violation of international law. Department of State Memorandum, March 1, 1961, quoted in 56 Am. J. Int. L. 165 (1962).

What is prohibited by the Law of Nations is not countenanced by the Fifth Amendment:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U. S. 40 at 49 (1960).

While military emergencies may require private rights to give way to the exercise of military powers, the United States is nevertheless required to make full restitution for the sacrifice of its citizens. *Mitchell v. Harmony*, 13 How. 115 (1851); *United States v. Russell*, 13 Wall. 623 (1871).

So much was recognized by the Government of France when through its Military Governor it permitted United Nations creditors to receive repayment of post-war claims against German Nationals on the basis of one Deutschemark for every Reichsmark of the principal of the debt.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALAN MILES RUBEN
Counsel for Petitioner

September 28, 1964